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Insurance Law: Public Policy Permits Insuring Against One's Own Intentional Acts of Discrimination

Daniel B. Yeager

California Western School of Law, dby@cwsl.edu

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INSURANCE LAW: PUBLIC POLICY PERMITS
INSURING AGAINST ONE'S OWN INTENTIONAL ACTS
OF DISCRIMINATION

Ranger Ins. Co. v. Bal Harbour Club, Inc.,
509 So. 2d 945 (Fla. 3d D.C.A. 1987)

Appellant insurance company provided liability insurance to a private club.¹ Appellee club looked to appellant for coverage and defense² of a religious discrimination suit.³ The suit commenced when third parties claimed that appellee's rules operated to deprive them of their right to purchase property.⁴ The complaint alleged violations under the United States Constitution,⁵ 42 U.S.C. § 1982,⁶ and local ordinances.⁷ Appellee settled the suit and sought indemnification under its insurance policy with appellant.⁸ Appellant then sought a declaration of no coverage under appellee's insurance policy.⁹ The trial court entered summary judgment against appellant.¹⁰ On appeal, the Florida

1. *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 509 So. 2d 940, 941 (1985), *aff'd on reh'g*, 509 So. 2d 945 (Fla. 3d D.C.A. 1987) (en banc).

2. *Id.* at 942. The personal injury liability coverage provided in part: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury." *Id.*

3. *Id.* at 946. The court characterized the issue as "tortious interference with a contract when the tortious interference involved amounts to intentional religious discrimination." *Id.* at n.1; *see Palm Beach Mobile Homes, Inc. v Strong*, 300 So. 2d 881, 884 (Fla. 1974) (right to contract and to use property are fundamental rights guaranteed by federal and state constitutions).

4. *Ranger*, 509 So. 2d at 949 (Ferguson, J., dissenting). The deed restricted the use of the property to "Caucasians," while excluding anyone with "more than one-fourth Hebrew or Syrian blood." Although the restriction had expired, appellee required that all purchasers first obtain membership to the club. The complaint alleged that the requirement operated to exclude Jews from membership. *Id.*

5. *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of restrictive covenants violates equal protection clause of fourteenth amendment)); *see also* FLA. CONST. art. I, § 2 (declaring all natural persons equal before the law, with inalienable rights to acquire, possess, and protect property); *cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) (thirteenth amendment authorized Congress to enact legislation such as 42 U.S.C. § 1982).

6. *Ranger*, 509 So. 2d at 949 n.2 (Ferguson, J., dissenting). The statute grants to all citizens the right to purchase and sell real property. 42 U.S.C. § 1982 (1982).

7. *Ranger*, 509 So. 2d at 949 n.3 (Ferguson, J., dissenting).

8. *Id.* at 949. The insurer negotiated a \$25,000 settlement that appellee was to pay. The appellee alleged that the insurance policy covered the claim. *Id.*

9. *Ranger*, 509 So. 2d at 941.

10. *Id.* The court ordered appellant to indemnify appellee in the amount of the settlement. *Id.*

Third District Court of Appeal affirmed the summary judgment and held that no exclusions precluded recovery under the policy's personal injury provision.¹¹ On rehearing *en banc*,¹² the court affirmed and HELD, public policy does not prohibit insurance recovery for a loss resulting from an intentional act of religious discrimination.¹³

The freedom to insure against intentional wrongs has never been absolute.¹⁴ From the inception of the liability insurance policy over one hundred years ago,¹⁵ one question has prevailed: whether public policy permits insuring against one's own intentional wrongs. Historically, courts addressing this question have balanced society's interest in deterrence, the victim's interest in compensation, and the insured's interest in indemnification.¹⁶

In balancing these interests, Florida courts have focused on the rights of the parties as expressed in the agreement.¹⁷ Although the

11. *Id.* at 944.

12. *Ranger*, 509 So. 2d at 945. After concluding the original rehearing, the court denied appellant's motion for an additional rehearing. *Id.* at 948.

13. *Id.* (citing FLA. CONST. art. V, § 3(b)(4) (granting the Florida Supreme Court authority to review questions of great public importance)). Faced with a novel issue, Florida's Third District Court of Appeal certified the following question: "Does the public policy of Florida prohibit an insured from being indemnified for a loss resulting from an intentional act of religious discrimination?" *Ranger*, 509 So. 2d at 948. The court observed that "no Florida case has decided the precise issue considered in this case . . ." *Id.* at 946 (citing, *e.g.*, *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir. 1980) (contract excluded intentional acts, thus court did not consider whether acts also excluded by public policy); *City of Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 657, 321 S.E.2d 232, 236 (1984) (because record was inadequate to determine whether discrimination occurred, court did not reach public policy issue); *School Dist. No. 1 v. Multnomah County Mission Ins. Co.*, 58 Or. App. 692, 701 n.4, 650 P.2d 929, 936 n.4 (1981) (because contract excluded discrimination, court declined to decide whether uninsurable as a matter of law)).

14. See PROSSER & KEETON ON THE LAW OF TORTS 584, 585 (W. Keeton 5th ed. 1984) (in the beginning, "[l]iability insurance was attacked as . . . encouragement to antisocial conduct.").

15. *Id.* "[T]he separate liability policy . . . developed first as a means of protecting employers." *Id.*

16. See Lenz, *Limiting the Role of Insurance in Civil Rights Litigation: A Case for Re-Establishing 42 U.S.C. § 1983 as an Enforcement Mechanism*, 5 J. CORP. L. 305, 327 (1980) (issue not between two extremes, but rather a balancing test).

17. See *Green v. Quincy State Bank*, 368 So. 2d 451, 453 (Fla. 1st D.C.A. 1979) ("rights existing under a valid contract enjoy constitutional protection"); *New England Mut. Life Ins. Co. v. Luxury Home Builders, Inc.*, 311 So. 2d 160, 163 (Fla. 3d D.C.A. 1975) ("A contract right . . . should not be impaired or abrogated by a court."); *cf.* *Aetna Casualty & Sur. Co. v. Cartmel*, 87 Fla. 495, 499, 100 So. 802, 803 (1924) (insurance contracts to be read in favor of insured (quoting *National Sur. Co. v. Williams*, 74 Fla. 446, 474-76 (Fla. 1917))).

courts consider public policy¹⁸ when interpreting contracts, the rights of both the victim and the insured have controlled recent decisions.¹⁹ Society's deterrence interest, based on the theory that one should not profit from one's own wrong,²⁰ became a secondary consideration. Absent an express exclusion for particular acts, Florida courts enforced insurance contracts that indemnify parties against their own wrongs.²¹

In *Hartford Fire Insurance Co. v. Spreen*,²² the Florida Third District Court of Appeal adhered to contract principles in defining the

18. See *Steele v. Drummond*, 275 U.S. 199, 205 (1927) (since public policy is vague and variable, contracts are held void only in clear cases); *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983) (exception to public policy exclusion when insured is vicariously liable for acts of wrongdoer (citing *Sterling Ins. Co. v. Hughes*, 187 So. 2d 898, 900 (3d D.C.A.), cert. denied, 194 So. 2d 622 (Fla. 1966))); see also *City of Cedar Rapids v. Northwestern Nat'l Ins. Co.*, 304 N.W.2d 228, 230 (Iowa 1981) (simpler to allow damages against insurer than against taxpayers). But see *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 433 (5th Cir. 1962) (Florida public policy prohibits insurance against liability for punitive damages); *Lyons v. Hartford Ins. Group*, 125 N.J. Super. 239, 244, 310 A.2d 485, 488 (1973) ("New Jersey public policy denies insurance indemnity for the civil consequences of one's own intentional wrongdoings.").

19. See Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 573 n.67 (1985). Professor Sugarman explains the importance of liability insurance:

Without insurance, fear of an enormous tort judgment could have a strong, socially undesirable impact. Many individuals . . . might abandon driving because of the risk . . . [T]he risk of losing one's capital as a result of enormous tort liability might deter the formation of small businesses . . . [T]hese examples represent overdeterrence — the undesirable squelching of socially acceptable behavior.

....

By contrast, large enterprises could deal sensibly with the unavailability of liability insurance through self-insurance.

Id.; see also Brown, "Accidental Loss" and Liability Insurance, 5 OTAGO L. REV. 523, 542 (1984) (liability insurance allows for carelessness when it may be beneficial to do so).

20. See *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) ("[N]o one shall be permitted to take advantage of his own wrong."). This phrase has become an axiom of the common law. See *Solo Cup. Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir. 1980); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 434 n.1 (5th Cir. 1962); *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 398, 425 N.E.2d 810, 814, 442 N.Y.S.2d 422, 426 (1981); *Carter v. Carter*, 88 So. 2d 153, 157 (Fla. 1956).

21. See *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1065 (Fla. 1983) ("Non-insurability is a defensive matter, with the burden resting on the insurer."); cf. *Halpin v. Hildebrand*, 493 So. 2d 75, 76-77 (Fla. 4th D.C.A. 1986) (public policy against self-indemnification for intentional wrongs not offended in uninsured motorist action brought by insured). But cf. *Carter v. Carter*, 88 So. 2d 153, 158 (Fla. 1956) (beneficiary of life insurance policy cannot intentionally kill and then collect proceeds on life of victim).

22. 343 So. 2d 649 (Fla. 3d D.C.A. 1977); see also *St. Paul Ins. Cos. v. Talladega Nursing Home, Inc.*, 606 F.2d 631, 634 (5th Cir. 1979) (intentional wrongs in Alabama include both intending injury and intending act that "reasonable and ordinary prudence would indicate likely to result in injury"); *MacKinnon v. Hanover Ins. Co.*, 124 N.H. 456, 459, 471 A.2d 1166, 1167 (1984) ("intent" refers to intention in mind of insured at time of action resulting in injury).

scope of intentional acts under an insurance agreement. In *Hartford*, appellee was sued for assault and battery and sought recovery from appellant insurer under two distinct insurance policies.²³ The court denied recovery under the homeowner's policy because the contract expressly excluded harm intentionally caused by the insured.²⁴ The court allowed recovery, however, under a separate personal catastrophe policy that covered several intentional acts,²⁵ although assault and battery was not listed among them.²⁶

The *Hartford* court held that, absent insured's intent to cause harm, insurance may cover intentional acts.²⁷ Public policy, however, precludes insurance recovery for deliberately harmful acts.²⁸ Although appellee insisted that his spontaneous act caused unforeseeable harm, the court found foreseeability irrelevant.²⁹ Because appellee acted with the specific intent to cause harm, even the extent of the harm did not qualify the assault and battery as an accident under the homeowner's policy.³⁰ The court found coverage, however, under a personal catastrophe policy that did not specifically exclude assault and battery. The court construed the contract in favor of the insured, thus also ensuring victim compensation.³¹

23. *Hartford*, 343 So. 2d at 650.

24. *Id.* The homeowner's policy covered bodily injury caused by an "occurrence." The policy defined "occurrence" as an "accident," excluding damage that the insured intended to cause. *Id.*

25. *Id.* at 652. The separate personal catastrophe policy covered "personal injuries" and a number of intentional torts. *Id.*

26. In extending recovery to an act not expressly included in the policy, the *Hartford* court turned the maxim "expressio unius est exclusio alterius" on its head. In essence, the court distinguished disparate treatment from disparate impact, and extended coverage to intentional acts, but denied coverage for intentional harm. *See Solo Cup. Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1186 (7th Cir. 1980) (disparate treatment requires discriminatory motive; disparate impact results not from discriminatory motive, but from discriminatory results from facially neutral criterion).

27. *Hartford*, 343 So. 2d at 651. An injury is intended if "the insured acted with the specific intent to cause harm to a third party." *Id.* at 652 (quoting *Allstate Ins. Co. v. Browning*, 598 F. Supp. 421, 423 (D. Or. 1983) (harm must be intended, although some acts are so certain to cause harm that intent is presumed); *Cloud v. Shelby Mut. Ins. Co.*, 248 So. 2d 217, 218 (Fla. 3d D.C.A. 1971)).

28. *Id.* at 651; *United Servs. Auto. Assoc. v. Elitzky*, 358 Pa. Super. 362, 371, 517 A.2d 982, 986-87 (1986) (exclusionary clauses in Pennsylvania apply only when insured intends harm); *cf.* cases cited *supra* note 18 (public policy considerations). *But see Fagot v. Ciravola*, 445 F. Supp. 342, 345 (E.D. La. 1978) (tort law aspires to compensate victims and deter wrongdoers).

29. *Hartford*, 343 So. 2d at 651.

30. *Id.*

31. *Id.* at 652.

The Florida Supreme Court further extended coverage for intentional acts in *Everglades Marina, Inc. v. American Eastern Development Corp.*³² In *Everglades*, appellees stored boats inside appellants' marina.³³ The marina owner set fire to the marina, damaging appellees' boats. After paying the damages, appellees' insurer sought indemnification from appellant and its insurer. On certification,³⁴ the court acknowledged that Florida public policy precludes recovery for losses resulting from an insured's intentional criminal acts.³⁵ The court asserted, however, that because appellees were third party beneficiaries, they stood beyond the reach of public policy.³⁶

Limiting its holding to third party beneficiaries, the *Everglades* court held that absent an express exclusion, public policy does not bar insuring against one's own criminal acts.³⁷ Because the third party beneficiaries played no role in the criminal acts, adhering to public policy would punish innocent parties.³⁸ The *Everglades* court refused to make appellees bear the brunt of appellant's misdeed. To protect the innocent, the court refused to read into appellant's contract a clause excluding criminal acts.³⁹ The court thus favored the interests of both the victims and the insured at the expense of the public's interest in deterring criminal conduct.

In *Zordan ex rel. Zordan v. Page*,⁴⁰ the Florida Second District Court of Appeal revived the *Hartford* intent restriction while adhering to the victim orientation found in *Everglades*. The insured appellee in *Zordan* was accused of sexually fondling a child.⁴¹ A clause in the

32. 374 So. 2d 517, 519 (Fla. 1979). The *Everglades* court ignored the issue of whether intentional acts or intentional harm preclude recovery.

33. *Id.* at 518.

34. *Id.* The United States Court of Appeals for the Fifth Circuit presented two certified questions to the court. After restating the first question, the court found it unnecessary to reach the second. *Id.*

35. *Id.* at 519.

36. *Id.*; see *Shingleton v. Bussey*, 223 So. 2d 713, 716 (Fla. 1969) ("third party beneficiary doctrine encompasses . . . cause of action against insurer in favor of members of public injured through acts of insured").

37. *Everglades*, 324 So. 2d at 519.

38. *Id.*

39. *Id.* The *Everglades* extension of coverage to criminal conduct presumably encompasses tortious conduct. By allowing coverage of criminal conduct, the *Everglades* court has broadened recovery to acts that display the community's disapproval through criminal penalties. See *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 398, 425 N.E.2d 810, 815, 442 N.Y.S.2d 422, 426 (1981) (mere fact that an act has penal consequences does not mean public policy precludes insurance coverage for same act).

40. 500 So. 2d 608 (Fla. 3d D.C.A. 1987).

41. *Id.* at 608.

insurance policy excluded intentional injuries from coverage, and appellees⁴² maintained that the clause precluded recovery.⁴³ Appellant-child sought to uphold coverage by arguing that the exclusion would not apply unless the insured specifically intended injury.⁴⁴

Applying the *Hartford* specific intent requirement, the *Zordan* court supported appellant's position that coverage could apply.⁴⁵ By abandoning the third party beneficiary restriction, the court broadened the potential scope of recovery.⁴⁶ The court reasoned that because the insurance policy did not expressly presume an intent to harm in sexual molestation cases, freedom of contract favored the insured.⁴⁷ In certain contexts, acts of sexual molestation justify presuming an intent to injure;⁴⁸ but certain that the vague facts of *Zordan* could not support such a presumption, the court remanded the case for additional findings.⁴⁹

In his dissenting opinion, Judge Frank chastised the majority for ignoring the intentional harm inherent in any act of sexual molestation.⁵⁰ Judge Frank insisted that damage was as certain to arise from sexual molestation as from an intentional punch in the face.⁵¹ Admonishing the court for not applying a foreseeability test, he feared that the stricter specific intent test would not deter wrongful acts.⁵²

In the instant case, the court ignored *Zordan's* intent test. Instead, the court used public policy to extend coverage to intentional acts of religious discrimination.⁵³ Relying in part on *Everglades*, the court emphasized that a victim's interest in compensation outweighs the public's interest in punishing wrongdoers.⁵⁴ In addition to the victim's interest, the court recognized an interest in protecting employers from

42. *Id.* at 608. Both insured and insurers were joined as appellees. *Id.*

43. *Id.* at 609.

44. *Id.*

45. *Id.* at 612. The court reversed and remanded for trial, finding "no basis to conclude as a matter of law that coverage is excluded." *Id.* The court decided not to deny insurance at this stage. *Id.* at 613.

46. *Id.* at 610.

47. *Zordan*, 500 So. 2d at 609.

48. *Id.* at 611-12.

49. *Id.* at 612.

50. *Id.* at 614 (Frank, J., dissenting).

51. *Id.* at 613.

52. *Id.*

53. *Ranger*, 509 So. 2d at 946-48.

54. *Id.* at 946.

discrimination suits.⁵⁵ Uninsurable damage awards could have a fatal effect on businesses.⁵⁶

While the court noted that businesses need shelter from adverse judgments, it also acknowledged that public policy condemns discrimination.⁵⁷ Because built-in safeguards uphold this policy, the court rejected the claim that insurance coverage encourages intentional discrimination.⁵⁸ First, imposing uninsurable punitive damages effectively deters wrongful conduct.⁵⁹ The court also contended that the insurance marketplace adequately serves this public policy.⁶⁰ Insurance companies would refuse to insure chronic discriminators.⁶¹ Further, insurers may exercise their freedom of contract to advance the public policy of deterring discrimination, simply by excluding coverage for discriminatory acts.⁶² Therefore, unless specifically excluded from the agreement, coverage extends to intentional religious discrimination.

In his dissent, Judge Ferguson faulted the majority for placing the victim's interest in compensation above society's interest in punishing wrongdoers.⁶³ He cautioned that insurance coverage would encourage discrimination,⁶⁴ and denied that the economic health of wrongdoers justified legitimizing intentional discrimination.⁶⁵ He also questioned whether the insurance marketplace would deny coverage to parties that discriminate.⁶⁶ Finally, Judge Ferguson concluded that public policy must give effect to constitutional and statutory provisions against

55. *Id.* at 948. The court noted that over 70,000 employment discrimination claims had been filed with the EEOC in 1983. *Id.*; cf. Chen, *Insurance of Section 1983 Punitive Damages: Wrong Law, Wrong Result*, 51 INS. COUNS. J. 533, 542 (1984) (uninsurable punitive damages in § 1983 suits have chilling effect on official action only in areas of questionable legality).

56. *Ranger*, 509 So. 2d at 948. *But see* Lenz, *supra* note 16, at 328 (mandatory self-insurance will have deterrent effect on employers' wrongful conduct).

57. *Ranger*, 509 So. 2d at 946-48.

58. *Id.* at 948.

59. *Id.*

60. *Id.*

61. *Id.*; *but see* Sugarman, *supra* note 19, at 579 ("[T]he risk that an insurer will drop a policy holder is small. Besides, most reasons why insurers decide not to renew are irrelevant to individual deterrence [E]ven where this [nonrenewal] threat is real, the insured can . . . find a . . . comparable insurer.").

62. *See Ranger*, 509 So. 2d at 947-48 (citing *Harris v. County of Racine*, 512 F. Supp. 1273, 1284 (E.D. Wis. 1981)).

63. *Id.* at 948-52 (Ferguson, J., dissenting). Analogizing to the goals of uninsurable punitive damages, Judge Ferguson placed deterrence above victim recovery as a public aim. *Id.* at 952 (citing *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 442 (5th Cir. 1962)).

64. *Id.* at 951.

65. *Id.* at 952.

66. *Id.* at 951.

discrimination,⁶⁷ since a lack of criminal sanctions deprives those provisions of meaningful force.⁶⁸ Therefore, public policy must forbid insurance coverage for intentional discrimination.⁶⁹

A fundamental premise in the instant case is that society has an interest in discouraging religious discrimination. Insurance also serves a societal interest by protecting both the injured party and the hapless defendant.⁷⁰ But with regard to intentional wrongs, the issue becomes whether coverage encourages wrongful conduct. Recent decisions have resolved this issue under a philosophy that favors compensation for victims of intentional wrongs.⁷¹

The *Hartford* court applied a victim-oriented philosophy cloaked in an analysis of the term "intentional."⁷² *Hartford* satisfied society's deterrence interests by denying recovery under the homeowner's policy for an intentional assault and battery.⁷³ The court also satisfied victims and the insured by finding coverage under a separate personal catastrophe policy.⁷⁴ In essence, the *Hartford* court promulgated two separate tests: a specific intent test⁷⁵ and an express exclusion test.⁷⁶ After *Hartford*, the specific intent test gave courts leeway to prohibit insurance recovery. Because the instant court raised victim compensation above society's deterrence objectives, however, it avoided the *Hartford* intent restrictions on recovery. Rather, the instant court utilized the second *Hartford* approach,⁷⁷ extending coverage except where expressly excluded.⁷⁸

An express exclusion requirement upholds freedom of contract, but presents two basic problems that the instant court did not address.

67. *Id.*; cf. *Crawford v. Gilchrist*, 64 Fla. 41, 54, 59 So. 963, 968 (1912) (duty of courts to give effect to existing constitution); *Lenz*, *supra* note 16, at 325 (society has vital interest in preventing recurring violations of fundamental rights).

68. *Ranger*, 509 So. 2d at 951-52 (Ferguson, J., dissenting).

69. *Id.*

70. See *Brown*, *supra* note 19, at 538 ("Absolute deterrence is not an appropriate goal The trick is to find the level of activity which produces no more than a tolerable level of harm.").

71. See *Zordan*, 500 So. 2d at 613; *Everglades*, 374 So. 2d at 519; *Hartford*, 343 So. 2d at 652.

72. *Hartford*, 343 So. 2d at 650-52.

73. *Id.* at 652. The homeowner's policy covered bodily injury caused by "accidents," excluding damage that the insured intended to cause. *Id.* at 650.

74. *Id.* at 652. The separate personal catastrophe policy covered "personal injuries" and a number of intentional torts. *Id.*

75. *Id.* at 651.

76. *Id.* at 652.

77. *Id.*

78. *Ranger*, 509 So. 2d at 946.

First, society's interest in deterrence precludes appointing insurance companies as the arbiters of civil rights. Second, freedom of contract extends only to contracts that are not contrary to public policy.⁷⁹

Hartford left open the door to prohibiting coverage for intentional wrongs.⁸⁰ *Everglades* began to close the door by allowing third parties to recover for damages from intentional wrongs.⁸¹ By extending recovery, *Everglades* revoked the intent requirement of *Hartford*.⁸² Because coverage reaches intentional harm, courts no longer must consider whether the insured intended the harm.

In rejecting the intent test, the *Everglades* court revealed its preference for victim recovery. The court, however, limited recovery to third party beneficiaries' direct recovery from the insurance company.⁸³ Thus, under *Everglades* one may not seek indemnification for one's own intentional wrongs.⁸⁴ As the instant majority observed, this third party restriction may be a hollow one.⁸⁵ An insured's refusal to satisfy a judgment forces the victim to bring a second suit, against the insurer.⁸⁶ Since an insured would presumably resist paying a victim, the third party restriction creates litigation.⁸⁷

Despite the shortcomings of the third party restriction and freedom of contract arguments of *Everglades*, the Florida Supreme Court did not foreclose use of the specific intent test. The instant court thus retained ample means to further society's deterrence objectives. Rather than exercise this option, the court argued that insurance for intentional wrongs does not encourage the covered behavior.⁸⁸

79. See *Skyline Harvestore Sys. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983) (court does not hesitate to invalidate contract that contravenes public policy (citing *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 335 (Iowa 1980))); see also *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 831, 884 (Fla. 1974) (liberty of contract constitutionally guaranteed, but degree of guarantee determined in light of social and economic conditions). *But cf.* *Steele v. Drummond*, 275 U.S. 199, 205 (1927) (no fixed rules by which to define public policy); *Harris v. County of Racine*, 512 F. Supp. 1273, 1281 (E.D. Wis. 1981) (state has more than one public policy).

80. *Hartford*, 343 So. 2d at 652.

81. *Everglades*, 374 So. 2d at 518.

82. In its analysis, the *Everglades* court did not address whether intentional wrongs or intentional harm preclude recovery.

83. *Id.* at 519.

84. *Id.*

85. *Ranger*, 509 So. 2d at 946.

86. *Id.* at 946 n.5.

87. *Id.*

88. *Id.* at 947-48.

The court's claim that the insurance marketplace would banish discriminators is unpersuasive.⁸⁹ Insurers usually decide against renewal for reasons irrelevant to individual deterrence.⁹⁰ The instant court found deterrence in the sting of uninsurable punitive damages;⁹¹ logically, wrongdoers avoid conduct for which they are held responsible. Yet by admitting that uninsurable punitive damages deter wrongful acts, the court conceded the very point it sought to deny. Arguably, any damage award, regardless of its label, deters the behavior that prompted the award.⁹² The instant majority drew a bright line between punitive and compensatory damages. By rigidly adhering to this distinction, the court elevated an interest in judicial certainty above that of deterring religious discrimination.

The instant court not only doubted the deterrent effect of denying coverage, but also identified the financial security of the insured as a concern.⁹³ The increase in discrimination suits created the need to protect businesses from adverse judgments.⁹⁴ Thus, the instant court raised the interests of insured wrongdoers above those of society. Such a conclusion is inappropriate because society ultimately must bear the cost of judgments, through increased premiums.⁹⁵ In addition, the chilling effect on businesses that the instant majority perceived would act only in areas of doubtful legality.⁹⁶ Liability might alert potential discriminators to more closely examine their practices.

89. *Id.*

90. See Sugarman, *supra* note 19, at 579. Usually, for example, non-renewals occur when an insurer withdraws from a geographic market or a class of customers. *Id.*

91. *Ranger*, 509 So. 2d at 948; *cf.* *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 433-34 (5th Cir. 1962) (Florida public policy prohibits insurance against liability for punitive damages). *But cf.* Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1162 (1984) (if goal is to punish, most appropriate forum is criminal justice system).

92. See *McNulty*, 307 F.2d at 438 ("compensatory liability . . . may discourage negligent conduct as a side effect"). The *McNulty* court also acknowledged the possibility that "there is enough of a punitive element in a tort system of liability based on fault." *Id.* at 441; see also *Fagot v. Ciravola*, 445 F. Supp. 342, 345 (E.D. La. 1978) (deterrence lies at the heart of tort law, not merely that aspect labeled "punitive").

93. *Ranger*, 509 So. 2d at 948.

94. *Id.*

95. See *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1068 (Fla. 1983) (no public policy served by shifting burden of damages to insurer and society at large); see also Sales & Cole, *supra* note 91, at 1162 (innocent consumer and taxpayer bear burden of punitive award). *But see* *Harris v. County of Racine*, 512 F. Supp. 1273, 1282 (E.D. Wis. 1981) (not necessarily public that suffers because burden may be spread among similarly situated violators).

96. Chen, *supra* note 55, at 542.

Finally, discrimination is not the only intentional wrong disfavored in our society, *Hartford* held that, at least under one policy, assault and battery presumes an intent to harm.⁹⁷ The *Zordan* court carried the *Hartford* specific intent test to its logical extreme. Under *Zordan*, only certain acts of sexual molestation carried the presumption of intent to cause harm.⁹⁸ *Hartford* presumed intent when an insult prompted a spontaneous punch in the face.⁹⁹ *Zordan*, however, did not presume intent to harm in acts of continued sexual molestation of a child.¹⁰⁰ Therefore, *Zordan* reduced "specific intent" to an empty term.

Despite *Zordan*, the instant court could have presumed intentional harm from religious discrimination. Discriminatory practices flow from long-standing policy and contemplation, not from spontaneity. But the instant court failed to address the intent issue. Instead, it disputed the deterrent effect of punishing wrongdoers,¹⁰¹ even though *Hartford*, *Everglades*, and *Zordan* accepted the deterrence of criminal penalties.¹⁰² Because intentional discrimination is not a criminal violation,¹⁰³ the instant court's extension of coverage traded away the most effective remaining deterrent mechanism.¹⁰⁴ Thus, the instant court made explicit what was implicit in predecessor cases: the preoccupation with victim recovery dictates the permissible scope of insurance coverage.¹⁰⁵

The instant case put the finishing touches on a Florida judicial philosophy that disputes the efficacy of deterrents. Perhaps the court gave too little attention to the constitutional, statutory, and local con-

97. *Hartford*, 343 So. 2d at 652.

98. *Zordan*, 500 So. 2d at 611-12.

99. *Hartford*, 343 So. 2d at 651.

100. *Zordan*, 500 So. 2d at 611.

101. *Ranger*, 509 So. 2d at 946.

102. *Zordan*, 500 So. 2d at 608 (sexual molestation of a child); *Everglades*, 374 So. 2d at 518 (arson); *Hartford*, 343 So. 2d at 650 (assault and battery).

103. *But see* Public Serv. Mut. Ins. Co. v. Goldfarb, 52 N.Y.2d 392 n.67, 425 N.E.2d 810, 814 n.67, 442 N.Y.S.2d 422, 426 n.67 (1981) (criminal penalties do not preclude insurance coverage for same act).

104. Uninsurable punitive damages also act as a deterrent, but juries award them inconsistently. Because jury discretion makes the award of punitive damages highly unpredictable, the threat of an uncertain punishment is unlikely to cause wrongdoers to adjust their behavior. Furthermore, punitive damages may have a questionable deterrent effect when the defendant is a corporate entity. Just as an employer is not deterred by punitive damages awarded for an employee's intentional act, an employee is not deterred when an employer must pay a punitive award. *See* Sales & Cole, *supra* note 91, at 1160-61 & n.198.

105. *But see* *Zordan*, 500 So. 2d at 613 (compassion for victim should not play a part in decisionmaking process).

demnation of discrimination. Until the Florida Supreme Court rules on this issue,¹⁰⁶ the courts are willing to place in the hands of insurers the enforcement of the public's deterrence interest. An insurer's willingness expressly to exclude wrongful acts is the new repository of civil rights.

Daniel B. Yeager

106. *See supra* note 13.